



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: LIN 99 100 52016 Office: Nebraska Service Center

Date: SEP 19 2000

IN RE: Petitioner:
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(i)(b)

Public Copy

IN BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

John F. O'Reilly
Terrence M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director who certified his decision to the Associate Commissioner for Examinations for review. The director's order will be withdrawn and the matter remanded to him for further action and consideration.

The petitioner is a trading and consulting firm which seeks to employ the beneficiary as a management consultant for a period of three years. The beneficiary is the petitioner's sole employee and sole owner.

The director determined that the petitioner's incorporation is an attempt by a sole proprietor to circumvent the immigration laws and regulations of the United States which do not provide for the filing of an H-1B petition by a sole proprietor in his own behalf. The director argues that the petitioner/beneficiary should be treated as a sole proprietor. The director found that the beneficiary is not a bona fide United States employer because a true employer-employee relationship does not exist.

In reply, counsel argues that a corporation with one employee may file a petition for that employee. Counsel further argues that Matter of Tessel, Inc., 17 I&N Dec. 631 (Act. Assoc. Comm. 1981), is the controlling precedent.

Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(i)(b), provides in part for nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1), defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

8 C.F.R. 214.2(h)(4)(ii) defines "United States employer" in part as a person, firm, corporation, contractor, or other association, or organization in the United States which has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee.

Matter of Tessel, supra, found that a corporation is a separate legal entity from its stockholders, able to employ them and file a petition on their behalf. Matter of Allan Gee, Inc., 17 I&N Dec. 296 (Act. Reg. Comm. 1979), found that in instances where a petitioner corporation has been duly incorporated under the laws of a State, it is a separate legal entity existing independently of its stockholder. Therefore, that sole stockholder may be the

beneficiary of a petition filed by the corporation to accord preference classification.

Matter of Aphrodite Investments Limited, 17 I&N Dec. 530 (Comm. 1980), stated unequivocally at page 531:

In Matter of M-, 8 I&N Dec. 24 (BIA 1958; A.G. 1958), precedent was established which held that the sole stockholder of a corporation was able to be employed by that corporation as the corporation has a separate legal entity from its owners or even its sole owner. While that case concerned a visa petition for preference classification, I find conclusions are equally valid in other areas of concern where an employer/employee relationship needs to be examined by the Service.

See also Matter of Silver Dragon Chinese Restaurant, 19 I&N Dec. 401 (Comm. 1986).

The director argues that this matter is distinguished from the decisions cited above because this matter deals with an H-1B petition and the decisions cited deal with preference or L-1 petitions. Nevertheless, the decisions cited have wide applicability. In addition, the representations of the director are insufficient to provide a rationale for the overturning or disregarding of established precedent. Accordingly, it is concluded that a bona fide employer-employee relationship does exist and that the petitioner qualifies as a United States employer.

The director has not determined if the proffered position is a specialty occupation or if the beneficiary qualifies to perform services in a specialty occupation. Accordingly, the matter will be remanded to him in order for him to make such determination. The director may request any evidence he deems warranted. Counsel may also submit additional documentation within a reasonable period to be determined by the director. Upon receipt of all evidence and representations, the director will enter a new decision.

ORDER: The decision of the director is withdrawn. The matter is remanded to him for further action and consideration consistent with the above discussion and entry of a new decision which, if adverse to the petitioner, is to be certified to the Commissioner for review.